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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ILSA SARAVIA, as next friend for A.H., a  
minor, and on her own behalf,

Petitioner/Plaintiff, on  
behalf of herself and others  
similarly situated,

v.

MATTHEW G. WHITAKER, Acting  
Attorney General of the United States; ALEX  
M. AZAR II, Secretary of the Department of  
Health and Human Services of the United  
States; LYNN JOHNSON, Assistant  
Secretary for the Administration for Children  
and Families; SCOTT LLOYD, Director of  
the Office of Refugee Resettlement of the  
United States; ELICIA SMITH, Federal Field  
Specialist of the Office of Refugee  
Resettlement of the United States; KIRSTJEN  
NIELSEN, Secretary of the Department of  
Homeland Security of the United States;  
RONALD D. VITIELLO, Deputy Director  
and Senior Official Performing the Duties of  
Director for U.S. Immigration and Customs  
Enforcement; and FRANK CISSNA, Director  
of U.S. Citizenship and Immigration Services,

Respondents/Defendants.

Case No. 3:17-cv-03615-VC

**SECOND AMENDED PETITION FOR WRIT  
OF HABEAS CORPUS AND CLASS ACTION  
COMPLAINT FOR INJUNCTIVE AND  
DECLARATORY RELIEF**

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## INTRODUCTION

1           **1.**       Under the guise of a “crackdown” on transnational street gangs, federal immigration  
2 authorities and the federal agency responsible for the care and custody of unaccompanied immigrant  
3 children have undertaken a concerted effort to arrest, detain, and transport children far from their  
4 families and attorneys, and to deny them immigration benefits and services to which they are entitled  
5 under U.S. law, based on flimsy, unreliable and unsubstantiated allegations of gang affiliation.  
6

7           **2.**       The agencies in charge of this effort do not undertake any meaningful review of the  
8 allegations of gang affiliation on which their decisions are based; do not inform the children, their  
9 families or their immigration counsel of the basis of these allegations; and do not provide them any  
10 opportunity to review or challenge the evidence the government relies on to place the children in jail-  
11 like conditions, destroy family integrity, and deny or interfere with access to relief under U.S.  
12 immigration laws.

13           **3.**       This treatment is not only extremely harmful; it is unlawful. But official statements  
14 and actions confirm that the administration plans to continue and expand its efforts to deport children  
15 profiled as gang members based on the neighborhoods they live in and their countries of origin, and  
16 that responsible federal agencies will continue to deny these children their statutory and constitutional  
17 rights.

18           **4.**       Petitioner and Plaintiff Ilsa Saravia (“Plaintiff”), acting as next friend for her minor  
19 child “A.H.”,<sup>1</sup> and the class she provisionally represents, has been a victim of this unlawful conduct.  
20 A.H. had previously been taken into custody and evaluated by the U.S. Department of Health and  
21 Human Services (“HHS”), Office of Refugee Resettlement (“ORR”), and had been released to her  
22 under an ORR sponsor agreement. Though he had only minor trouble in the juvenile justice system,  
23 A.H. was rearrested by the U.S. Department of Homeland Security (“DHS”), Immigration and  
24 Customs Enforcement (“ICE”), denied access to family and legal counsel, transported far from home,  
25 and held in jail-like conditions for months without any process through which he could challenge his  
26

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27 <sup>1</sup> While Plaintiff’s son is now eighteen years old, he was under eighteen at the outset of this action and  
28 at the time the Court provisionally certified a class. Accordingly, Plaintiff’s son is referred to as a  
minor child in this Second Amended Complaint.

1 confinement or deny the gang allegations that were the reason for his harsh treatment. These and other  
 2 actions by the federal authorities also threaten A.H.'s access to lawful status in the United States and  
 3 therefore may result in his deportation to a country from which he has fled abuse and violence.

4       **5.** Plaintiff brings this action on behalf of A.H. and two classes (the "Classes") consisting  
 5 of all unaccompanied immigrant children (also referred to as "UCs") who came to the country as  
 6 unaccompanied minors; were previously detained in ORR custody and then released by ORR to a  
 7 sponsor; and (a) have been or will be rearrested by DHS on the basis of a removability warrant on or  
 8 after April 1, 2017 on allegations of gang affiliation (the "Detention Class") and/or (b) have been or  
 9 will be denied immigration benefits or relief by USCIS at a time when DHS has or is aware of any  
 10 information that the noncitizen is or may have been affiliated with a gang ("Benefits Class")  
 11 (collectively, "Class members" or "members of the Plaintiff Classes"). Plaintiff seeks declaratory and  
 12 injunctive relief to prevent Defendants from continuing to carry out an unlawful scheme to arrest,  
 13 summarily incarcerate, and deny immigration benefits to Class members in violation of federal  
 14 immigration law and fundamental rights guaranteed to all persons under the U.S. Constitution.  
 15 Injunctive relief is necessary to end these ongoing violations of Plaintiff's constitutional and statutory  
 16 rights.

## 17 JURISDICTION

18       **6.** This Court has subject matter jurisdiction over a writ of habeas corpus and Plaintiff's  
 19 complaint for injunctive and declaratory relief pursuant to Art. I, § 9, cl. 2 of the United States  
 20 Constitution; 28 U.S.C. § 2201; 28 U.S.C. § 2241; 28 U.S.C. § 1331; 28 U.S.C. § 1343; 28 U.S.C.  
 21 § 1361; and 5 U.S.C. § 702. This action arises under the First, Fourth and Fifth Amendments of the  
 22 United States Constitution; the Immigration and Nationality Act ("INA"); the William Wilberforce  
 23 Trafficking Victims Protection Reauthorization Act ("TVPRA"), 8 U.S.C. § 1232; and the  
 24 Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*

## 25 VENUE

26       **7.** Venue is properly with this Court pursuant to 28 U.S.C. § 2241 and 18 U.S.C.  
 27 § 1391(e). A defendant resides in this District, and a substantial part of the events or omissions giving  
 28 rise to the claims occurred in the Northern District of California, including decisions concerning the

1 detention of Plaintiff's son, who was held in ORR custody in Yolo County in northern California at  
 2 the time this action commenced. Specifically, Defendant Elicia Smith, the Federal Field Specialist  
 3 who serves as the approval authority for transfer and release decisions pertaining to unaccompanied  
 4 minors within the Northern California region, is, or was at the time this action commenced, based in  
 5 San Francisco. Venue is proper in this Court pursuant to *Braden v. 30th Judicial Circuit Court of*  
 6 *Kentucky*, 410 U.S. 484, 493-94 (1973).

### 7 INTRADISTRICT ASSIGNMENT

8 **8.** Pursuant to Civil L. R. 3-2(c), this case is properly assigned to the San Francisco  
 9 Division of this Court because the action arises in the City and County of San Francisco.

### 10 PARTIES

11 **9.** Plaintiff Ilsa Saravia, the next friend of A.H., is the mother of A.H. and is filing this  
 12 complaint and petition on A.H.'s behalf. She also seeks injunctive relief on her own behalf as to the  
 13 Second Claim for Relief only. Plaintiff Saravia resides in Amityville, Suffolk County (Long Island),  
 14 New York. Plaintiff Saravia is A.H.'s sponsor under an agreement with ORR, has been awarded sole  
 15 custody of A.H. by the State of New York, and is dedicated to A.H.'s best interests.

16 **10.** A.H. was, at the time this action commenced, a seventeen year old unaccompanied  
 17 immigrant child and a citizen of Honduras. Until June 12, 2017, he resided with his mother on Long  
 18 Island, but was then arrested by ICE and transported by Defendants to a secure detention facility in  
 19 Woodland, California, where he remained in the custody of ORR at the time this action commenced.  
 20 As such, at the time this action commenced and at the time the Court provisionally certified the  
 21 Detention Class in this case, he was in custody under color of the authority of the United States, and  
 22 he was in custody in violation of the Constitution or laws of the United States, within the meaning of  
 23 28 U.S.C. § 2241.

24 **11.** Defendant Matthew G. Whitaker is the Acting Attorney General of the United States,  
 25 responsible for the enforcement of the nation's immigration laws. He is sued solely in his official  
 26 capacity.

27 **12.** Defendant Alex M. Azar II is the Secretary of HHS, the federal agency upon whose  
 28 orders the individual Plaintiff Class members were detained. He is sued solely in his official capacity.



1           **21.** Under the TVPRA, “[a] child shall not be placed in a secure facility absent a  
2 determination that the child poses a danger to self or others or had been charged with committing a  
3 criminal offense.” 8 U.S.C. § 1232(c)(2)(A).

4           **22.** According to rules published on the ORR website under the title “Children Entering  
5 the United States Unaccompanied” (“ORR Rules”), a “secure care facility” is, in essence, a maximum  
6 security prison for children, characterized by “a secure perimeter, major restraining construction inside  
7 the facility, and procedures typically associated with correctional facilities.”<sup>2</sup> ORR Rules, § 1.2.4. A  
8 “staff secure facility” is for children “who may require close supervision but do not need placement  
9 in a secure facility.” *Id.*, Guide to Terms. A “staff secure” facility “maintains stricter security  
10 measures . . . than a shelter in order to control disruptive behavior and to prevent escape,” and may  
11 also contain a “secure perimeter with a ‘no climb’ fence.” *Id.* Detention in either kind of facility  
12 constitutes a significant deprivation of liberty.

13           **23.** The TVPRA permits ORR to consider a variety of factors in determining where to place  
14 an unaccompanied minor who has been transferred into its custody, including “danger to self, danger  
15 to the community, and risk of flight.” 8 U.S.C. § 1232(c)(2)(A). Section 1.2.4 of the ORR Rules  
16 permits ORR to place a UC in a secure care facility if the UC “[h]as been charged with, is chargeable  
17 with a crime, or has been convicted of a crime,” but such crimes are not to include “isolated offenses”  
18 or “petty offenses.”

19           **24.** As required by the TVPRA, many minors are released by ORR to the custody of a  
20 “sponsor” – typically a parent or other close family member – under an agreement pursuant to which  
21 the sponsor agrees to care for the UC (“Sponsored UCs”). 8 U.S.C. § 1232(c)(3)(A). The process of  
22  
23

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24           <sup>2</sup> Except where otherwise noted, Plaintiffs use the term “secure” to include residential treatment  
25 centers (RTCs) which, according to ORR, are “24-hour-a-day structured program[s]” that that ORR  
26 uses “at the recommendation of a psychiatrist or psychologist or with ORR Treatment Authorization  
27 Request (TAR) approval for an unaccompanied alien child who poses a danger to self or others and  
28 does not require inpatient hospitalization.” ORR Rules: Guide to Terms, available at  
<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms>.  
RTCs are often locked facilities with 24 hour surveillance and monitoring and, as recently  
found by a federal court, “engage[] in practices that are not necessary for the protection of minors or  
others.” *Flores v. Sessions*, 2:85-cv-04544-DMG, Dkt. No. 470 at 13 (C.D. Cal., July 30, 2018).



1 releasing a UC to a sponsor involves a comprehensive evaluation by ORR of both the UC and the  
2 sponsor.

3       **25.** ORR, in the past and in most circumstances, utilizes a “placement matrix” to evaluate  
4 the factors relevant to the decision of whether to place a UC in a secure or staff secure facility.

### 5 **Other Rights of Unaccompanied Children**

6       **26.** The TVPRA further provides that the Secretary of HHS shall ensure, to the greatest  
7 extent practicable, that unaccompanied minors in HHS custody “have counsel to represent them in  
8 legal proceedings” and “[t]o the greatest extent practicable . . . shall make every effort to utilize the  
9 services of pro bono counsel who agree to provide representation to such children without charge.”  
10 8 U.S.C. § 1232(c)(5).

11       **27.** The U.S. Constitution confers additional rights on minors in immigration proceedings  
12 since relevant protections extend to all “persons” regardless of immigration status. Among these rights  
13 are the First Amendment right to access to the courts and counsel and to petition the government; the  
14 Fourth Amendment guarantee of freedom from unreasonable searches and seizures; and Fifth  
15 Amendment guarantees of substantive and procedural due process.

### 16 **ICE “Sweeps” Target Unaccompanied Minors**

17       **28.** On July 28, 2017, President Donald J. Trump gave a speech in Brentwood, NY, a  
18 hamlet within the Long Island town of Islip, in which he decried the fact that “unaccompanied alien  
19 minors arrived at the border and were released all throughout our country into United States  
20 communities” – even though the release of UCs into “the least restrictive setting that is in the best  
21 interest of the child” is explicitly required by the TVPRA. The President repeatedly asserted that “the  
22 laws are stacked against us.” He declared that “we will restore law and order on Long Island,” but  
23 also made clear that his ambitions were broader, stating, “we’re just getting started . . . one by one,  
24 we’re liberating our American towns” from alleged gang members, whom he referred to as “animals.”<sup>3</sup>  
25  
26

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27 <sup>3</sup> “Trump’s speech encouraging police to be ‘rough,’ annotated,” Washington Post, 7/28/17, available  
28 at: [https://www.washingtonpost.com/news/politics/wp/2017/07/28/trumps-speech-encouraging-police-to-be-rough-annotated/?utm\\_term=.0be6120d2adc](https://www.washingtonpost.com/news/politics/wp/2017/07/28/trumps-speech-encouraging-police-to-be-rough-annotated/?utm_term=.0be6120d2adc).

1           **29.** In an interview with Fox News commentator Tucker Carlson broadcast on August 3,  
 2 2017, then-Attorney General Jeff Sessions said: “[W]e need to be able to deport people rapidly who  
 3 enter the country illegally, and we have to end this policy of taking unaccompanied minors . . . and  
 4 turning them over to the Department of Health and Human Services, and then they take them to their  
 5 ‘destination city’. . . . So this is a very bad and dangerous policy and it can be ended and it must be  
 6 ended.”<sup>4</sup>

7           **30.** Consistent with these statements, Defendants enacted an aggressive enforcement  
 8 program against Plaintiff’s son and other juveniles like him, resulting in the harms that are the subject  
 9 of this lawsuit.

10           **31.** In the spring of 2017, ICE agents began a program of conducting immigration “sweeps”  
 11 in various locations, in which they arrest UCs whom local law enforcement authorities have identified  
 12 to ICE as being affiliated with gangs. One location in which such a sweep has commenced is  
 13 Brentwood, NY. As a result of this sweep and subsequent sweeps, the individual Detention Class  
 14 members – each of whom is a Sponsored UC – have been arrested, often transported to distant  
 15 locations, and incarcerated.

16           **32.** On June 14, 2017, ICE announced in a press release that it had launched “Operation  
 17 Matador,” a joint initiative with several local law enforcement agencies in and around New York City  
 18 including the Suffolk County Police Department (“SCPD”). ICE announced that during the previous  
 19 30 days, “45 individuals were arrested during this ongoing enforcement effort, all of which were  
 20 confirmed as gang members and affiliates.” This included 12 unaccompanied children, all of whom  
 21 were allegedly “confirmed as MS-13 gang members.” According to the same press release,  
 22 individuals are “confirmed as gang members” if they meet any of a number of criteria, including “if  
 23 they admit membership in a gang” or have been “identified as a gang member by a reliable source.”<sup>5</sup>

24           **33.** Since the spring of 2017, numerous UCs living in and around Brentwood have been  
 25 arrested by ICE, purportedly on the basis that they are somehow “affiliated” with gangs or gang

26 \_\_\_\_\_  
 27 <sup>4</sup> Video of interview available at: <http://insider.foxnews.com/2017/08/03/jeff-sessions-tucker-carlson-tonight-ms-13-illegal-immigration>.

28 <sup>5</sup> “Operation Matador nets 39 MS-13 arrests in last 30 days,” 6/14/17, available at: <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>.

members. They are then summarily transported to “secure care facilities,” which are prison-like detention centers under the jurisdiction of ORR, including the Yolo County Juvenile Detention Facility (“Yolo”) in Woodland, California. Yolo is under the jurisdiction of the Northern California Field Office of ORR and Defendant Elicia Smith, the Federal Field Specialist in charge of that office. Yolo is one of only two secure care facilities used by ORR, the other being the Shenandoah Valley Juvenile Center in Staunton, Virginia.

**34.** Operation Matador was merely the leading edge of a broader effort by the Trump Administration to target unaccompanied minors for arrest and detention based on alleged gang affiliation and to retain them in ORR custody until they turn eighteen, at which point they are transferred to ICE.

**35.** On July 21, 2017, Reuters reported that based on an internal government memo it had seen, “U.S. immigration agents are planning nationwide raids . . . to arrest, among others, teenagers who entered the country without guardians and are suspected gang members . . . .” Reuters quoted ICE as contending that “a person can be identified as a gang member if they meet two or more criteria, including having gang tattoos, frequenting an area notorious for gangs and wearing gang apparel.” According to the document, ICE field offices are directed “to identify people in their areas that meet the criteria.”<sup>6</sup>

**36.** ICE often relies on local law enforcement to identify suspected gang members. During a White House press briefing on July 27, 2017, Thomas Homan, then the Acting Director of ICE, was asked, “[H]ow are suspected gang members being identified for ICE enforcement? Is it just through local law enforcement . . . ?” He responded, in part: “Local law enforcement, they’re usually the ones that – you know, they – they have the most intelligence on gang members. It’s part of what we look for to find gang members.”<sup>7</sup>

<sup>6</sup> “Exclusive: U.S. Immigration raids to target suspected gang members,” by Julia Edwards Ainsley, 7/21/17, available at: [http://www.reuters.com/article/us-usa-immigration-raids-exclusive-idUSKBN1A62K6?utm\\_source=twitter&utm\\_medium=Social](http://www.reuters.com/article/us-usa-immigration-raids-exclusive-idUSKBN1A62K6?utm_source=twitter&utm_medium=Social).

<sup>7</sup> Video available at: [https://www.youtube.com/watch?v=\\_CrNIU9vAbk](https://www.youtube.com/watch?v=_CrNIU9vAbk) (beginning at 18:30). The official White House text, which is slightly different, is available at: <https://www.whitehouse.gov/the-press-office/2017/07/27/press-briefing-press-secretary-sarah-sanders-7272017-2>.

1           **37.** For their part, at least some local law enforcement officials view ICE enforcement as a  
 2 way to remove from their communities youths that they view with suspicion, even in the absence of  
 3 evidence sufficient to support a criminal arrest, much less a criminal conviction. Suffolk County  
 4 Police Commissioner Timothy Sini recently admitted in an interview: “There are times when we know  
 5 someone is an MS-13 gang member . . . but we’re not in a position to make a criminal arrest. So  
 6 another tool in our toolbox is to work with the Department of Homeland Security to target active  
 7 known MS-13 gang members for violation of civil immigration laws, which is another way to remove  
 8 dangerous individuals from our streets.”<sup>8</sup>

9           **38.** In written testimony on May 22, 2017 to the Senate Committee on Homeland Security  
 10 and Governmental Affairs, Commissioner Sini elaborated on SCPD’s “gang eradication strategy,”  
 11 stating that its tactics include “effectuating street arrests” of suspected gang members, “debriefing all  
 12 of our arrestees,” and “shar[ing] intelligence with Homeland Security . . . in order to facilitate the  
 13 commencement of removal proceedings . . . .” He also stated that “we automatically notify the  
 14 Department of Homeland Security when we arrest an individual for a misdemeanor or felony who was  
 15 not born in this country so that immigration authorities can take appropriate action . . . .”<sup>9</sup>

16           **39.** The SCPD is currently a party to an agreement with the U.S. Department of Justice that  
 17 requires SCPD to implement “significant changes in how it engages the Latino community.” The  
 18 agreement, entered into in 2014, is the culmination of an investigation commenced by the Department  
 19 of Justice in 2009, arising out of allegations of discriminatory policing directed against Latinos.<sup>10</sup>

20           **40.** Notwithstanding this troubling history, ICE uncritically accepts allegations of  
 21 suspected gang membership made by SCPD in deciding to issue arrest warrants for unaccompanied  
 22  
 23

24 <sup>8</sup> “39 Members of MS-13 Are Arrested, Authorities Say,” *New York Times*, June 14, 2017, available  
 25 at: <https://nyti.ms/2sq/JMWt>.

26 <sup>9</sup> Timothy D. Sini, Testimony Regarding MS-13, given to the United States Committee on Homeland  
 27 Security and Governmental Affairs, 5/22/17, at pp. 9-11, available at:  
 28 <https://www.hsgac.senate.gov/download/05/22/2017/testimony-sini-2017-05-24>.

<sup>10</sup> U.S. Department of Justice Press Release, “United States Agrees to Comprehensive Settlement To  
 Resolve Its Investigation Of The Suffolk County Police Department For Discriminatory Policing  
 Against Latinos,” 12/3/13, located at: <https://www.justice.gov/usao-edny/pr/united-states-agrees-comprehensive-settlement-resolve-its-investigation-suffolk-county>.

1 minors in Suffolk County. To make matters worse, ORR does not subject these allegations to any  
2 form of review before placing a child in secure detention.

3 **41.** Rather, it is ORR's policy to *override* its own placement matrix to ensure that any gang  
4 allegation – regardless of corroboration – automatically results in secure confinement. That is, where  
5 local law enforcement alleges that a UC is affiliated with a gang, ORR automatically places that UC  
6 in a jail-like facility, even if the factors typically considered by ORR dictate placement in a less secure  
7 setting.

### 8 **Resulting Deprivations of Plaintiff's and Class Members' Rights**

9 **42.** As a result of the administration's current crackdown, Plaintiff Class members have  
10 been subjected to a cascading series of deprivations of their statutory, court-ordered and Constitutional  
11 rights. Because they are suspected of gang involvement – often based on nothing more than conjecture  
12 and profiling – they have been placed by ORR in secure care or staff secure facilities, making a  
13 mockery of the TVPRA's statutory requirement that they be placed in "the least restrictive setting that  
14 is in the best interest of the child." The deprivations described herein are even more glaring because  
15 Plaintiff Class members, as Sponsored UCs, have already been apprehended by the federal  
16 government, released to the custody of ORR, and released by ORR to the custody of a sponsor.

17 **43.** On June 12, 2017, ORR amended § 1.2.4 of the ORR Rules to permit it to consider, as  
18 a basis for placement in secure custody, whether the UC "has self-disclosed violent history or gang  
19 involvement prior to placement in ORR custody" and "reported gang affiliation or display[ing] gang  
20 affiliation while in care." These amendments coincided with the rollout of "Operation Matador" and  
21 the arrests of multiple Class members.

22 **44.** Evidence adduced in this case has shed light on Defendants' practices regarding the  
23 arrest, detention and transfer of UCs suspected of gang affiliation. When ICE arrests a UC suspected  
24 of gang affiliation, it promptly notifies ORR of the arrest, but does not immediately transfer physical  
25 custody of the UC to ORR. Instead, ICE keeps the UC in secure detention at an undisclosed location,  
26 without making any effort to notify the UC's sponsor, family members, or counsel, or to provide the  
27 UC access to counsel.  
28

1           **45.** While ICE keeps the UC imprisoned, it sends a bare summary of information about the  
 2 UC to ORR via email. This information may include significant errors, including reporting the  
 3 existence of criminal charges that have been dismissed or otherwise resolved, or inaccurate notations  
 4 that an individual is a “self-admitted gang member;” and relies on hearsay allegations by local law  
 5 enforcement authorities that have not been tested or questioned in any form by ICE.

6           **46.** As discussed above, it is ORR’s policy and practice to place UCs suspected of gang  
 7 affiliations in a secure care facility. ORR takes no steps to corroborate the allegations of gang  
 8 affiliation, which are often based on circumstantial evidence or multiple layers of hearsay.

9           **47.** ICE rearrests Sponsored UCs suspected of gang affiliations, not on criminal warrants,  
 10 but on administrative warrants stating only that “there is probable cause to believe that [the UC] is  
 11 removable from the United States . . . based upon . . . the pendency of ongoing removal proceedings  
 12 against the subject.”

13           **48.** As to Sponsored UCs, such rearrest based on nothing more than “removability” violates  
 14 the TVPRA. If ICE can upend ORR’s decisions to reunify UCs with their parents under sponsor  
 15 agreements and serially rearrest Sponsored UCs solely based on “removability,” the protections  
 16 afforded UCs under the TVPRA are meaningless.

17           **49.** In addition, ICE arrests of Sponsored UCs based on removability and absent reliable  
 18 information about changed circumstances that justify such arrest — as opposed to a process by which  
 19 ORR reviews its own prior custody determination based on information provided by ICE or other  
 20 sources — are unreasonable under the Fourth Amendment.

21           **50.** When ICE notifies ORR that it has rearrested a Sponsored UC, ORR treats the UC as  
 22 though this were the first time it had ever been in contact with the UC, ignoring its own previous  
 23 evaluation of the UC and his or her sponsor. In sworn testimony given in this Court on June 29, 2017,  
 24 ORR Senior Field Specialist Supervisor James De La Cruz stated that in the case of a rearrest of a  
 25 Sponsored UC, it is ORR policy *not* to contact the UC’s sponsor prior to deciding to place the UC in  
 26 secure detention and permitting ICE to transport the UC to a location distant from the sponsor.

27           **51.** Within a few hours of receiving ICE’s notification and recommendation, ORR takes  
 28 steps to place the unaccompanied minor in accordance with ICE’s recommendation. In making this

1 decision, ORR relies exclusively on information provided by ICE via email, without any attempt to  
 2 review any of its own files concerning the UC or its own prior custody determination, to corroborate  
 3 any of ICE's information, or to provide notice to the child (or his or her guardian or attorney) as to  
 4 what information is being considered. In his sworn testimony in this Court, Mr. De La Cruz admitted  
 5 that it has "no procedures for reviewing or challenging [ICE's] recommendation" before making a  
 6 decision to send a UC to secure detention. In essence, ORR merely accepts whatever is reported by  
 7 ICE. In addition, ORR policy dictates that once detained, suspected gang members are not to be  
 8 released. An ORR internal memo dated August 16, 2017 states: "No current gang members are eligible  
 9 for release to a sponsor . . . ."

10 **52.** After ORR determines where the child will be detained, ICE transports the UC to that  
 11 facility, and transfers physical custody of the minor to ORR only after the transportation process has  
 12 been completed. During this time, neither ICE nor ORR makes any effort to inform the minor's family  
 13 members, sponsor, or counsel concerning the child's whereabouts, or to permit them any opportunity  
 14 to be informed of, much less challenge, ICE's and ORR's placement decision.

15 **53.** Also during this time, ICE systematically deprives unaccompanied minors of their Fifth  
 16 Amendment rights by interrogating them without counsel present, even if the child has attempted to  
 17 resist answering questions and/or requested to contact his or her counsel before answering.

18 **54.** ORR, for its part, is summarily placing these children in secure detention without the  
 19 required "determination that the child poses a danger to self or others or has been charged with having  
 20 committed a criminal offense." 8 U.S.C. 1232(c)(2)(A). ORR's placement decisions also violate its  
 21 obligation that a UC be placed in "the least restrictive setting that is in the best interest of the child."  
 22 By reflexively accepting the recommendations of ICE, it is only considering the alleged "interest" of  
 23 law enforcement authorities. Moreover, because ORR's policy and practice is to take 30 days to  
 24 complete any re-evaluation of its initial placement decision, ORR's conduct imposes a 30-day period  
 25 of confinement in jail-like conditions on Plaintiff.

26 **55.** Even in the 30-day period following this initial placement, ORR does not provide  
 27 unaccompanied minors, their sponsors, or their attorneys the evidence upon which ORR relies to  
 28 detain them in the most restrictive settings available for children in ORR custody. Neither a UC, nor



1 his or her counsel or sponsor, has any opportunity to test this evidence, to cross examine the witnesses  
2 who may be the source of incriminating information, or to present additional facts to a neutral decision-  
3 maker who could weigh the evidence impartially.

4 **56.** The arrest and transfer of unaccompanied minors to distant locations and their detention  
5 in jail-like conditions is extremely harmful. It is a severe deprivation of liberty that imposes  
6 psychological harm and suffering upon the children who are detained. It also prevents unaccompanied  
7 minors from seeing their families, meeting with counsel, and participating meaningfully in ongoing  
8 immigration proceedings and other matters that impact their ultimate ability to remain in the United  
9 States. These harms are imposed even when not required by geographic limitations of available  
10 facilities. Many unaccompanied minors who were originally placed in secure facilities were later  
11 “stepped down” to “staff secure” facilities geographically distant from their families, lawyers, and  
12 court proceedings, despite the presence of “staff secure” ORR facilities in their home regions.

13 **57.** As a result of these policies and practices, prior to the entry of the Preliminary  
14 Injunction in this case, a Sponsored UC who was rearrested on gang affiliation had no ability to rebut  
15 or disprove the allegations against the UC, or earn release back to the UC’s sponsor. Rather, as  
16 revealed by an internal ORR memorandum, it was the Government’s policy that Sponsored UCs  
17 arrested on allegations of gang affiliation were to be held by ORR until they turned eighteen, at which  
18 point they would be transferred to ICE for adult detention. ORR also took the position that even if it  
19 could not establish that a rearrested Sponsored UC was a flight risk or a danger to the community, the  
20 rearrest gave it the right to re-examine the suitability of the sponsor whom it had previously approved,  
21 and ORR frequently delayed or denied the release of Sponsored UCs based on pretextual concerns  
22 about sponsor suitability.

23 **58.** In addition to the impediment that detention in remote facilities has on unaccompanied  
24 minors’ participation in ongoing legal proceedings, allegations of gang involvement are shared with  
25 USCIS and used as a pretense to deny children benefits to which they are otherwise entitled under the  
26 law. ICE memorializes and shares allegations of gang involvement, including in memoranda entitled  
27 “Alien File Regarding Gang Affiliation” that it then places in children’s files. This so-called “gang  
28 memo” directs that the child at issue “should not be afforded any type of immigration services, relief,



benefit or otherwise released from custody pending the outcome of removal proceedings.” The immigration benefits, protections, and services (“Immigration Benefits”) implicated by these gang memos and other forms of ICE information-sharing with USCIS include, but are not limited to, SIJ status, U-visa status, and T-visa status.

**59.** USCIS has issued notices of intent to deny or revoke approval of SIJ status for unaccompanied minors who are alleged to have gang affiliations, and in some cases has denied or revoked SIJ status on that basis. On information and belief, that USCIS has issued these notices and taken other actions to deny or obstruct unaccompanied minors’ access to Immigration Benefits to which they are entitled based on DHS’s recommendations, without any independent review of the evidence upon which DHS’s recommendations are made.

#### **FACTS PERTAINING TO A.H.**

**60.** After suffering severe abuse and neglect from his father in Honduras, A.H. fled Honduras and entered the United States as an unaccompanied minor on or about April 26, 2015. After crossing the border, A.H. was detained by U.S. Customs and Border Protection in the Rio Grande Valley, a region in southern Texas. A.H. was then placed in the custody of ORR. A.H. spent one month in ORR custody at Lincoln Hall Boys’ Haven in Lincolndale, New York, before being released to the custody of his mother, Plaintiff Saravia, on or about May 28, 2015. Plaintiff Saravia signed a sponsor agreement with ORR and became A.H.’s official sponsor.

**61.** For over two years, between May 28, 2015 and June 12, 2017, A.H. lived with Plaintiff Saravia, his mother and sponsor, in Long Island, New York. By order of the New York State Family Court for Nassau County dated January 29, 2016, Plaintiff Saravia was awarded sole residential and legal custody of A.H.

**62.** As described below, A.H. became eligible to apply for SIJ status upon the issuance of an appropriate state court order (commonly referred to as a “Predicate Order”) finding that (1) he is a dependent of the court; (2) he cannot be reunited with one parent due to abuse, abandonment and/or neglect; and (3) it is not in his best interest to return to his home country. 8 U.S.C. § 1101(a)(27)(J). If A.H. obtains SIJ classification (using USCIS Form I-360) based on a Predicate Order, he can obtain

1 lawful permanent residency and a path to citizenship, and he can be protected from removal from the  
2 United States.

3 **63.** On or about January 3, 2017, through his New York attorney, Stephanie Gibbs, A.H.  
4 filed a Motion for Special Findings in the Family Court in Nassau County, requesting that the Family  
5 Court issue a Predicate Order containing the findings required under the TVPRA. On January 18,  
6 2018, the Nassau family court issued an order containing the findings necessary to establish A.H.’s  
7 eligibility for SIJ status. On January 31, 2018, A.H., through his immigration counsel, filed an I-360  
8 application with USCIS requesting SIJ classification. That application remains pending with USCIS.<sup>11</sup>

9 **64.** A.H. is also the subject of removal proceedings under 8 U.S.C. § 1229a in Immigration  
10 Court in New York, New York.

11 **65.** On or about June 12, 2017, A.H. was arrested outside his home by two plainclothes  
12 officers who identified themselves as ICE officers and said they had an order to arrest him. The DHS  
13 arrest warrant stated, as the sole cause for the arrest, that DHS had “probable cause to believe” that  
14 A.H. was “removable from the United States . . . based on . . . the pendency of ongoing removal  
15 proceedings . . . .” A.H. asked why the officers were arresting him and they told A.H. he had admitted  
16 to being in a gang, which was untrue. The officers handcuffed him and transported him to a holding  
17 cell. They did not give him an opportunity to gather any belongings or to communicate with either  
18 his mother or his attorney.

19 **66.** During his time in the United States, A.H. has had two minor brushes with law  
20 enforcement, neither of which resulted in a conviction of any offense. In April or May 2016, a  
21 classmate alleged that A.H. had threatened him with a knife. Although A.H. was charged with  
22 “menacing with a weapon,” A.H. denies having even been in possession of a knife and the charges  
23 were later adjourned in contemplation of dismissal. In March 2017, A.H. was charged with fifth  
24 degree marijuana possession, the lowest possible possession offense. This charge, too, was adjourned  
25 in contemplation of dismissal. At the time of his arrest, A.H. informed the arresting officers that his  
26 criminal cases had been resolved.

27 \_\_\_\_\_  
28 <sup>11</sup> In the meantime, USCIS granted A.H. a temporary work authorization document, which would be  
revoked if he is denied Immigration Benefits.

1           **67.** Under New York criminal law, adjournment in contemplation of dismissal is a final  
 2 adjudication that does not involve either an admission or a finding of guilt, and therefore should not  
 3 be treated as a “conviction” that carries adverse immigration consequences.

4           **68.** Shortly after arresting A.H., ICE informed ORR via email that it had arrested A.H., and  
 5 provided ORR with information concerning A.H., much of which was incomplete or incorrect, or both.  
 6 ICE informed ORR of A.H.’s two arrests, but falsely stated that the arrest for “menacing” had occurred  
 7 within the previous three weeks and that criminal charges were “pending,” when in fact the arrest had  
 8 occurred a year earlier and the charges had been adjourned in contemplation of dismissal. ICE also  
 9 falsely informed ORR that the charge for possession of marijuana was “pending,” when in fact it too  
 10 had been adjourned in contemplation of dismissal. Finally, ICE falsely reported that A.H. was a “self-  
 11 admitted gang member,” based on a double-hearsay statement in a SCPD arrest report that is  
 12 inconsistent with an earlier statement in the same report, which explicitly stated that A.H. denied being  
 13 a gang member. ICE recommended to ORR that A.H. be placed in secure confinement.

14           **69.** Based on this incomplete and largely inaccurate information, in less than three hours  
 15 ORR accepted ICE’s recommendation that A.H. should be sent to secure confinement, and arranged  
 16 for him to be sent to Yolo. During this time, ORR did not review its own extensive files on A.H.  
 17 relating to its earlier decision to release him to the custody of his mother; did nothing to question or  
 18 verify any of the third-hand information reported by ICE; did not inform A.H., his mother or his  
 19 counsel of its determination or the information it was relying on in making the determination; and did  
 20 not allow A.H., his mother or his counsel any opportunity to challenge the information or confront  
 21 witnesses against him.

22           **70.** A.H. remained in ICE custody for approximately 36 hours, during which time ICE  
 23 transported him first to a secure detention facility in New York City; and then by airplane to Los  
 24 Angeles and Sacramento, California; and finally to Yolo. During this entire time he was detained by,  
 25 and in the physical custody of, ICE agents. A.H. was not formally transferred to ORR custody until  
 26 after ICE had placed him in secure detention at Yolo.

1           **71.** During his detention by ICE, A.H. made repeated requests to be permitted to contact  
2 his attorney, but every such request was denied. He was interrogated by ICE officers notwithstanding  
3 that he had an attorney and had requested to be able to talk to his attorney.

4           **72.** Even though ICE had already sent information to ORR stating that A.H. was a “self-  
5 admitted gang member,” the ICE agents repeatedly asked A.H. if he was in a gang. A.H. denied all  
6 involvement with a gang.

7           **73.** A.H. also requested to be permitted to contact his mother, but his requests were denied  
8 until he told the agents that he would not talk to them until he had been permitted to speak with his  
9 mother. When he was permitted to call his mother for a very short time, he told her that he had been  
10 arrested by ICE and that she should contact his attorney.

11           **74.** During the time of his initial detention and transportation across country, A.H.’s  
12 attorney, Ms. Gibbs, repeatedly requested of Defendants and their agents information concerning  
13 A.H.’s location, his condition, and the reasons he had been detained. Defendants did not even confirm  
14 that they had arrested A.H. until the day after his arrest; and even then, they provided no information  
15 as to A.H.’s whereabouts until approximately 5:00 p.m. on Tuesday, June 13, 2017, when Mr. De La  
16 Cruz of ORR finally told A.H.’s attorney that A.H. was “en route” to Yolo. Even then, Mr. De La  
17 Cruz did not provide information about who had decided to send him there or why A.H. had been  
18 taken into custody.

19           **75.** At a hearing in this case on June 29, 2017, after hearing testimony from Mr. De La  
20 Cruz of ORR, the Court ruled that because ORR “had already screened the child, screened the mother,  
21 made a decision that the child could be placed with the mother, and entered into a contract with the  
22 mother regarding the care of the child,” ORR “had an obligation to investigate the information it was  
23 receiving from DHS about A.H.” The Court ordered Defendants “to look much more carefully than  
24 it has done up to now into whether it should have taken the child into custody,” including that it must  
25 “conduct a careful check of the accuracy of the information it received from DHS . . . including  
26 contacting the appropriate local law enforcement officials who might have information about the  
27 child’s status as a member or affiliate of MS-13.” The Court also ruled that “ORR must give the child  
28 an opportunity to be heard in the presence of his attorney and must give his attorney the opportunity

1 to be heard in connection with this decision,” and that “ORR must give the attorney access to all the  
2 information on which the decision would be based and give her an opportunity to respond to that  
3 information before the final decision is made . . . .” (Dkt. No. 22, at 5-6.)

4 **76.** At the time of A.H.’s arrest, his Family Court matter was scheduled to take place on  
5 July 6, 2017 at 9:00 a.m. in Westbury, New York. A.H. had planned to be present and to testify on  
6 his own behalf in order to establish the conditions that would enable the Court to issue the Predicate  
7 Order under the TVPRA.

8 **77.** ORR took some of the steps ordered by the Court. In response to the Court’s order,  
9 ORR produced a written report dated July 10, 2017. That report described the steps taken by ORR in  
10 revisiting its initial decision regarding A.H.’s placement, but did not indicate that ORR had contacted  
11 local law enforcement officials about the allegations of gang membership, noting only that “[w]e  
12 believe the documents we received are authentic, and A.H.’s counsel makes no claim that they are  
13 otherwise.” (Dkt. No. 27-1, at 2.) While refusing to concede that it had acted improperly or reached  
14 an erroneous conclusion in connection with its initial decision to place A.H. in secure confinement,  
15 ORR decided that A.H. should be “stepped down” to a less restrictive “staff secure facility” (*id.* at 5),  
16 and subsequently transferred A.H. to a staff secure facility in Dobbs Ferry, NY, closer to his home.

17 **78.** After A.H. was transferred to Dobbs Ferry, his attorney and Plaintiff Saravia diligently  
18 provided information and access as required by ORR to seek his reunification with Plaintiff Saravia.  
19 A.H.’s reunification petition was denied.

20 **79.** Among the documents ORR provided to A.H. in response to this Court’s order was a  
21 memo dated June 26, 2017 bearing the seal of Defendant DHS that concludes, “In light of [A.H.’s]  
22 affiliation to a violent street gang, he should not be afforded any type of immigration services, relief,  
23 benefit or otherwise released from custody pending the outcome of removal proceedings.” This memo  
24 indicates its intended recipient is “Alien File Regarding Gang Affiliation.” Alien files – commonly  
25 known as “A files” – are accessible to USCIS and relied upon in adjudications of applications for  
26 immigration relief or benefits.

27 **80.** After this Court granted A.H. preliminary injunctive relief on November 20, 2017, an  
28 immigration judge ruled that A.H. was not a danger to the community and must be released from

1 custody. Despite this ruling, DHS refused to release A.H. from ORR custody to his mother, Plaintiff  
 2 Saravia, claiming that it had developed doubts as to whether Ms. Saravia continued to be a suitable  
 3 sponsor. Plaintiff was required to make an emergency application for A.H.'s release to this Court  
 4 (ECF No. 108), which Defendants opposed (ECF No. 113). Only after this Court ordered DHS to  
 5 release A.H. did it actually do so. (ECF No. 117.)

6 **81.** As a result of Defendants' wrongful acts, A.H. was arrested without cause, placed in a  
 7 secure cell 2,500 miles from his mother and guardian, deprived of access to his counsel, and deprived  
 8 of notice and an opportunity to be heard on whether he should be detained, in violation of due process  
 9 and federal law.

10 **82.** Based on the experiences of other similarly situated UCs including those described  
 11 below who were denied immigration benefits as a result of ICE memos similar to those in A.H.'s A  
 12 file, there is a substantial risk that USCIS will not grant A.H.'s SIJ Status Petition (USCIS Form I-  
 13 360) as a result of ICE's allegations that A.H. is affiliated with a gang.

#### 14 **OTHER CLASS MEMBERS**

15 **83.** F.E. first entered the United States in June 2014. After being arrested by immigration  
 16 authorities within the United States, ORR released him to the custody of his mother. In June 2017,  
 17 ICE rearrested him as a seventeen year old based on unsubstantiated gang allegations. ICE transferred  
 18 him to a secure ORR facility.

19 **84.** After he was taken into ORR custody in June 2017, F.E.'s attorney and mother  
 20 diligently provided information and repeatedly sought F.E.'s release and reunification with his family.  
 21 ORR denied F.E.'s release. On information and belief, ORR's refusal to release F.E. was based on  
 22 Defendants' inaccurate, unfounded, and unreliable gang allegations.

23 **85.** Only after this Court granted the provisional Class preliminary injunctive relief on  
 24 November 20, 2017 and an immigration judge found F.E.'s detention was unwarranted did ORR  
 25 release F.E. to his family.

26 **86.** Meanwhile, F.E. had applied for SIJ status on October 28, 2016. On February 13, 2017,  
 27 USCIS issued a notice of action indicating its approval of SIJ status. On the basis of this approval,  
 28 F.E. had applied to adjust his status to lawful permanent resident. However, on June 21, 2017, just

1 days after his rearrest by ICE, USCIS notified F.E. of its intent to revoke his SIJ status, based in part  
 2 on a claim that the Family Court that had issued the predicate order on which SIJ status was based had  
 3 not been informed of F.E.'s alleged "gang activities." USCIS subsequently revoked F.E.'s SIJ status,  
 4 again citing his alleged gang affiliation. F.E. has appealed this determination to the Administrative  
 5 Appeals Office of USCIS.

6 **87.** J.G. first entered the United States in 2015. After being arrested by immigration  
 7 authorities within the United States, ORR released him to the custody of his mother. In June 2017,  
 8 ICE arrested him as a seventeen year old based on unsubstantiated gang allegations. ICE transferred  
 9 him to a secure ORR facility.

10 **88.** Only after this Court granted the provisional Class preliminary injunctive relief on  
 11 November 20, 2017 and an immigration judge found J.G.'s detention was unwarranted did ORR  
 12 release J.G. to his family.

13 **89.** Prior to his rearrest by ICE in 2017, J.G. had applied for a U-3 visa as a derivative of  
 14 his mother's U Visa (a visa for which certain crime victims are eligible). He was placed in removal  
 15 proceedings when he arrived in the U.S. in 2015, but those proceedings were administratively closed  
 16 because of the pending U-3 visa application. In February 2017, USCIS notified J.G.'s attorney that  
 17 USCIS considers J.G. inadmissible based on a record that includes "information indicating that he is  
 18 a confirmed member of the Mara Salvatrucha (MS-13) street gang," based in part on such nebulous  
 19 factors as "frequenting an area notorious for gangs," "being seen by law enforcement or by a source  
 20 previously deemed reliable displaying gang signs or symbols," and "being identified as a gang member  
 21 by documented or undocumented sources of information previously deemed reliable by law  
 22 enforcement personnel."

23 **90.** In August 2017, USCIS issued a letter denying J.G.'s application for a U-3 visa. USCIS  
 24 found him "inadmissible" and therefore ineligible for the visa because "the record indicates that federal  
 25 and local law enforcement have identified him as an active MS-13 gang member." The denial letter  
 26 repeats the same nebulous factors as did the earlier notification. USCIS concluded that "law  
 27 enforcement has deemed [J.G.] a threat to the public," even though an immigration judge later found  
 28 he did not pose such a threat in the hearing ordered by this Court. USCIS found that the evidence



presented by J.G.'s attorney to show that he was not a gang member – including the absence of gang tattoos on his body – was insufficient.

**91.** Prior to this Court granting preliminary injunctive relief to the provisional Class, at no time was J.G. given any explanation of the reasons upon which ORR based its decision to place him in a secure facility or to move him to staff-secure facility far from his home, family, and immigration attorney, or any opportunity to examine the evidence on which ORR relied in making its decision, or any opportunity confront the evidence or witnesses against him, or to present evidence on his own behalf.

**92.** USCIS has denied or imminently will deny the applications for Immigration Benefits filed by other Class members. L.V., a Class member, was redetained by ICE in July 2017 and ordered released at his *Saravia* hearing in November 2017 after an immigration judge found the gang allegations against him baseless. But six months later, USCIS denied his application for SIJS status — pending since prior to his redetention — on the basis of those same allegations, finding that the state court had not made an informed decision in issuing the predicate special findings order. Despite the immigration judge's findings and wealth of other evidence that L.V. is not gang affiliated, USCIS stated that L.V. "has been identified by the Suffolk County Police Department Gang Unit as a known member of a violent street gang" as the police gang unit "has observed the petitioner wearing paraphernalia indicative of gang membership on multiple occasions in the presence of known gang members."

**93.** A state court also made the predicate findings for another Class member, J.B., to obtain SIJ status. But USCIS then issued a notice of intent to deny him SIJ status on the basis that the state court could not have made an informed decision because the child was a gang member. USCIS ultimately denied J.B. SIJ status.

**94.** As set forth more fully below, on November 20, 2017 this Court provisionally certified a Class in this action and issued a preliminary injunction requiring Defendants to grant prompt hearings to Class members who had been rearrested and detained on gang allegations, in order to determine whether their detention was justified by changed circumstances relating to flight risk or dangerousness. In the months immediately following the issuance of the preliminary injunction, 32



Class members were afforded what came to be known as “*Saravia* hearings” before Immigration Judges. As of March 2018, Immigration Judges found the allegations of danger unfounded as to 30 of those Class members, underscoring the appropriateness of the preliminary relief ordered by the Court and the need for a permanent injunction.

### CLASS ACTION ALLEGATIONS

**95.** Plaintiff, as an individual and in her representative capacity, brings the claims set forth herein against Defendants pursuant to Federal Rule of Civil Procedure 23(b)(2) to certify an injunctive relief class. On November 20, 2017, this Court provisionally certified the Detention Class, with respect to the Second Claim for Relief, of noncitizen minors meeting the following criteria:

- (1) the noncitizen came to the country as an unaccompanied minor;
- (2) the noncitizen was previously detained in ORR custody and then released by ORR to a sponsor; (3) the noncitizen has been or will be rearrested by DHS on the basis of a removability warrant on or after April 1, 2017 on allegations of gang affiliation.

(ECF No. 100 at 38.)

**96.** As of the time of filing of this Second Amended Petition, Plaintiff has filed a Motion to Clarify the Class Definition (ECF No. 159). Subsequent references to the “Detention Class” will incorporate any revised class definition that the Court may establish.

**97.** Plaintiff, in her representative capacity, also seeks to certify, with respect to the Fourth Claim for Relief, the Benefits Class, an injunctive relief class of noncitizens who filed an application for Immigration Benefits before they reached 21 years of age<sup>12</sup> and meet the following criteria:

- (1) the noncitizen came to the country as an unaccompanied minor;
- (2) the noncitizen was previously detained in ORR custody and then released by ORR to a sponsor; (3) the noncitizen has been or will be denied immigration benefits or relief by USCIS at a time when DHS has or is aware of any information that the noncitizen is or may have been affiliated with a gang.

**98.** On information and belief, both the Detention Class and the Benefits Class consists of a large number of similarly situated individuals located throughout the country, such that joinder of all members of the respective Classes is impracticable.

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<sup>12</sup> See 8 U.S.C. 1101(b)(1) (defining generally “child” for purposes of immigration benefits as “unmarried person under twenty-one years of age”).

1           **99.**     There are common questions of law and fact affecting individual Class members,  
2 including but not limited to, the following:

3                   **a.**       Whether Defendants' policies, practices and conduct of arresting and detaining  
4 unaccompanied minors based on allegations of gang affiliation are implemented without reliable  
5 information supporting those allegations;

6                   **b.**       Whether ICE's arrest of Plaintiff was based on reliable evidence of changed  
7 circumstances following ORR's release of Plaintiff to a parent;

8                   **c.**       Whether Defendants' policies, practices and conduct result in the placement of  
9 unaccompanied minors in secure, residential treatment centers, or staff-secure care facilities without  
10 notice to the unaccompanied minors' family members, sponsors, or counsel;

11                   **d.**       Whether Defendants' policies, practices and conduct result in the placement of  
12 unaccompanied minors in ORR secure, residential treatment centers, or staff-secure care facilities  
13 without notice or opportunity to rebut the allegations ORR relies on to justify secure or staff-secure  
14 custody;

15                   **e.**       Whether Defendants' criteria for placement of unaccompanied minors in a  
16 secure, residential treatment center, or staff secure facility are so overbroad so as not to be justified by  
17 Defendants' interests;

18                   **f.**       Whether Defendants have an obligation to transfer unaccompanied minors who  
19 are stepped down to lower security facilities to available facilities near the minors' homes and/or  
20 families;

21                   **g.**       Whether Defendants' policies, practices and conduct with respect to Sponsored  
22 UCs unlawfully denies or obstructs the unaccompanied minors' access to Immigration Benefits;

23                   **h.**       Whether such policies, practices and conduct violated and continue to violate  
24 Plaintiff's rights to be free from unreasonable seizures under the Fourth Amendment of the United  
25 States Constitution;

26                   **i.**       Whether such policies, practices and conduct violated and continue to violate  
27 the Plaintiff's rights, absent changed circumstances based on credible information, to remain in the  
28

1 custody of a parent or other sponsor once released thereto by ORR under the TVPRA, 8 U.S.C. §  
2 1232;

3           **j.**       Whether such policies, practices and conduct violated and continue to violate  
4 Plaintiff's rights to procedural and substantive due process as to Immigration Benefits under the Fifth  
5 Amendment and the APA;

6           **k.**       Whether such polices, practices and conduct violated and continue to violate  
7 the Plaintiff's rights to be placed in the least restrictive setting under the TVPRA, 8 U.S.C. §  
8 1232(c)(2)(A); and

9           **l.**       Whether injunctive relief should issue to enjoin the policies, practices and  
10 conduct of the Defendants' agents and employees.

11       **100.** Plaintiff's claims are typical of those of the Class members with respect to the  
12 constitutionality and legality of Defendants' policies, practices and conduct at issue here. The  
13 prosecution of individual actions against Defendants by individual members of the Plaintiff Classes  
14 would create a risk of inconsistent and varying adjudications, which would result in variable standards  
15 of conduct for Defendants and a lack of uniform immigration policy nationwide.

16       **101.** Plaintiff will fairly and adequately protect the interests of members of the Plaintiff  
17 Classes and are unaware of any conflict among or between the members of the Plaintiff Classes that  
18 would preclude their fair and adequate representation. Plaintiff is represented by counsel who have  
19 extensive experience litigating similar matters.

#### 20           **INJUNCTIVE AND DECLARATORY RELIEF ALLEGATIONS**

21       **102.** Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as  
22 though fully set forth herein.

23       **103.** An actual and substantial controversy exists between Plaintiff and Defendants  
24 regarding their respective legal rights and duties. Plaintiff contend that Defendants have violated Class  
25 members' constitutional and statutory rights as alleged above. Defendants deny that their conduct  
26 violates any such rights and intend to continue such conduct.

27       **104.** Moreover, in view of Defendants' policies and practices, at the time this action  
28 commenced, Plaintiff was threatened with continuing and future deprivations of her rights, because

her son could have been “stepped up” to secure detention without due process, or, in the event he had been released to her, he could have been rearrested based on the continuing status of being in removal proceedings and sent again to secure detention.

**105.** Defendants’ conduct as alleged above has caused and, absent permanent injunctive relief or a writ of habeas corpus, will in the future cause irreparable harm to members of the Plaintiff Classes denying Class members family integrity, liberty without due process, as well as their statutory and contractual rights to be placed in the least restrictive setting that is in their best interest.

**106.** Under the APA, “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.” 5 U.S.C. § 704. This Court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law.” 5 U.S.C. § 706.

**107.** There is no adequate remedy at law for the continuing violations by Defendants of Class members’ constitutional and statutory rights.

**FIRST CLAIM FOR RELIEF**  
**Unlawful Arrest**  
**Fourth Amendment to the U.S. Constitution; 8 U.S.C. § 1232; 5 U.S.C. §§ 702, 706**  
 (By Plaintiff Against Defendants Whitaker, Nielsen and Vitiello)

**108.** Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as though fully set forth herein.

**109.** At the time that ICE arrested each member of the Plaintiff Classes, the Class member had been released to a parent or other sponsor pursuant to an ORR sponsorship agreement and was living at liberty.

**110.** Prior to his release to a sponsor under an ORR sponsorship agreement, each member of the Plaintiff Classes had been in ORR custody, and had been previously released to ORR by an agency of DHS pursuant to the TVPRA.

**111.** Although ICE has broad authority to arrest undocumented persons, the TVPRA limits that authority in the case of Sponsored UCs, who have been previously arrested, placed in immigration proceedings, and transferred to the custody of HHS. Consistent with the TVPRA’s mandate that “the care and custody of all unaccompanied alien children, including responsibility for their detention,

where appropriate, shall be the responsibility of the Secretary of Health and Human Services,” 8 U.S.C. § 1232(b)(1), from and after the time an arresting agency transfers custody of a UC to ORR, ORR takes responsibility for the UC care and custody, and is required to place the UC in “the least restrictive setting that is in the best interest of the child.” 8 U.S.C. § 1232(c)(2).

**112.** It is implicit in the structure and language of the TVPRA that once ORR makes a determination that it is in the best interest of a UC to be released to a parent or other sponsor, ICE may not simply rearrest a Sponsored UC on grounds of removability, but may act only in the face of changed circumstances that are exigent in nature and based on credible information. Were this not the case, the protections conferred by the TVPRA would be meaningless, as Sponsored UCs would be perpetually subject to rearrest by ICE.

**113.** ICE lacked reliable information of changed or exigent circumstances that would justify the arrests of Class members after ORR had made a determination that it was in the best interests of each member of the Plaintiff Classes to be released to a parent or other sponsor pursuant to an ORR sponsorship agreement; accordingly, ICE did not have a reasonable basis to rearrest the Class members.

**114.** For all of the above reasons, ICE’s arrests of Class members violated the TVPRA, 8 U.S.C. § 1232.

**115.** For all of the above reasons, ICE’s arrest of Plaintiffs also constituted an unreasonable seizure in violation of the Fourth Amendment to the U.S. Constitution.

**116.** Unless enjoined, ICE will continue to rearrest minors who have been previously released to sponsors by ORR without reliable information of changed or exigent circumstances that would justify arrest in violation of the TVPRA, 8 U.S.C. § 1232 and the Fourth Amendment to the U.S. Constitution.

**SECOND CLAIM FOR RELIEF**  
**Deprivation of Liberty without Procedural Due Process**  
**Fifth Amendment to the U.S. Constitution; 5 U.S.C. §§ 702, 706**  
 (By Plaintiff Against All Defendants except Defendant Cissna)

**117.** Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as though fully set forth herein.

**120.** Confinement in a secure, residential treatment centers, or staff secure ORR contract facility is a significant deprivation of liberty.

**122.** In addition to unlawfully transporting Plaintiffs far from family to detain them in secure facilities, Defendants fail to consistently transfer Plaintiffs who are “stepped down” to lower security facilities to available facilities near Plaintiffs’ homes and families.

**THIRD CLAIM FOR RELIEF**  
**Excessive Restraint of Liberty**  
**Fifth Amendment to the U.S. Constitution; TVPRA (8 U.S.C. § 1232); 5 U.S.C. §§ 702, 706**  
(By Plaintiff Against All Defendants except Defendant Cissna )

**125.** The TVPRA requires that unaccompanied minors in HHS custody be “promptly placed in the least restrictive setting that is in the best interest of the child,” and other protections to ensure compliance with the “least restrictive setting” standard and family reunification. 8 U.S.C. § 1232(c).

COOLEY LLP  
ATTORNEYS AT LAW  
SAN FRANCISCO

1           **127.** Members of the Plaintiff Classes do not meet Defendants' own criteria for placement  
2 in a secure or staff secure care facility.

3           **128.** To the extent Class members meet Defendants' criteria for placement in a secure or  
4 staff secure care facility, those criteria are so overbroad as to impose liberty restrictions that are not  
5 reasonably related to Defendants' interests.

6           **129.** Detention of Class members in secure or staff secure facilities is so unnecessarily  
7 restrictive as to be punitive in nature and therefore violates their right to substantive due process.

8           **130.** Defendants have violated, and, unless enjoined, will continue to violate, Class  
9 members' rights under the TVPRA and the substantive due process component of the Fifth  
10 Amendment.

11                           **FOURTH CLAIM FOR RELIEF**  
12                           **Denial of Immigration Benefits**  
13                           **Fifth Amendment to the U.S. Constitution; 5 U.S.C. §§ 702, 706**  
                                  **(By Plaintiff Against All Defendants)**

14           **131.** Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as  
15 though fully set forth herein.

16           **132.** The Fifth Amendment right to due process also includes the right to apply for  
17 Immigration Benefits to which an individual is eligible and to have such an application adjudicated  
18 fairly. The APA also prohibits Defendants from taking action that is arbitrary and capricious, contrary  
19 to law, or unconstitutional, and requires the fair adjudication of immigration benefits that is consistent  
20 with law.

21           **133.** Defendant DHS has issued memos directing that, due to alleged gang affiliation, Class  
22 members should be denied any Immigration Benefits, including but not limited to SIJ status, U-visa  
23 status, and T-visa status, or release from custody pending their removal from the United States.

24           **134.** Based on unsubstantiated gang allegations, and without providing Class members a  
25 meaningful opportunity to rebut those allegations, Defendant USCIS denies and revokes approval for  
26 Immigration Benefits for which Class members are eligible under U.S. and international law.  
27  
28



Wherefore, Plaintiff prays for the following relief:

**1.** A declaration that Defendants have violated the rights of Plaintiff Class members under the First, Fourth, and Fifth Amendments to the U.S. Constitution, the TVPRA, and the INA in connection with their arrest, transportation, and detention to secure or staff secure detention facilities and their denial of Immigration Benefits;

**2.** A declaration that:

**a.** ICE may not rearrest UCs who have previously been released to the care and custody of ORR, including those that ORR has released to the care and custody of a parent or other sponsor, without reliable evidence of changed circumstances that are sufficiently serious and exigent to justify arrest;

**b.** Before placing a Sponsored UC into custody, ORR must provide the UC notice of the accusations and the basis of the accusations upon which ORR predicates its custody decision and an opportunity to respond to that evidence at a hearing before a neutral decision maker in which ORR has the burden of justifying the custody decision and the UC has the right to be represented by counsel and cross-examine witnesses;

c. ORR may not place a UC in confinement in a secure detention center, residential treatment center, or staff secure detention center absent admissible evidence of non-trivial criminal conduct or evidence that the UC poses a danger to himself or others, and dangerousness cannot be based on gang allegations based in whole or in part on clothing, appearance, and associations; and

**d.** Defendants may not deny access to Immigration Benefits, including by interfering in a UC's state court proceedings, based in whole or in part on gang allegations that are based solely on clothing, appearance, and associations;



1           **3.**       An order certifying a class or classes consisting, in whole or part, of all Sponsored UCs  
 2 who are rearrested by Defendants on a removability warrant based on allegations of changed  
 3 circumstances, including but not limited to allegations of gang affiliation, or such class or classes as  
 4 the Court may deem appropriate;

5           **4.**       A permanent injunction ordering Defendants, and all persons acting under their  
 6 direction:

7               **a.**       to immediately afford Class members who are currently in custody in secure  
 8 detention centers, residential treatment centers, or staff secure facilities access to the evidence upon  
 9 which ORR based its custody decision and an opportunity to be heard before a neutral decision-maker  
 10 regarding that evidence, including the opportunity to cross-examine witnesses upon whose statements  
 11 ORR relies;

12               **b.**       to immediately transfer Class members in staff secure facilities to a facility  
 13 within no more than two hours' driving distance from their guardians, sponsors or representatives;

14               **c.**       to refrain from arresting UCs who were previously released by ORR to a parent  
 15 or other sponsor without reliable information of changed circumstances that are sufficiently serious  
 16 and exigent to justify arrest;

17               **d.**       to afford Class members who come into ORR custody in the future and as to  
 18 whom ORR receives or makes a recommendation to place in secure custody notice of the accusations  
 19 and the basis of the accusations upon which ORR predicates its custody decision and an opportunity  
 20 to respond to that evidence at a hearing before a neutral decision maker in which ORR has the burden  
 21 of justifying the custody decision and the UC has the right to be represented by counsel and cross-  
 22 examine witnesses before transferring the UC to secure custody or within 48 hours of referral to ORR,  
 23 whichever comes first; and

24               **e.**       to refrain from interfering with Class members' access to Immigration Benefits  
 25 including by detaining them and denying Immigration Benefits due to unsubstantiated gang  
 26 allegations, including gang allegations that are based solely on clothing, appearance, and associations;

27           **5.**       Attorneys' fees and costs; and

28           **6.**       For such other and further relief as the Court may deem proper.

1 Dated: November 15, 2018

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF NORTHERN CALIFORNIA

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